IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1255

JAMES C. ANDERS, APPELLANT,

versus

JESSE J. FLOYD, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

BRIEF FOR JAMES C. ANDERS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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I.

Dismissal or summary affirmance would precipitate the invalidation of a number of State statutes which were based on the language of ROE v. WADE.

Concerning the constitutionality of § 44-41-20(c), it was noted in the Jurisdictional Statement that the lower court erred in holding the statute unconstitutional because the court applied the more restrictive Missouri definition of viability rather than the one set forth by this Court in *Roe v. Wade,* 410 U. S. 113, 160 (1973). Dr. Floyd does not address this distinction, but instead contends that "Since the statute is invalid, this Court need not be concerned with

differences, if any, between the Missouri and *Roe* definitions of viability." (Motion at 24). However, as this Court noted in *Planned Parenthood of Missouri v. Danforth,* 428 U. S. 52, 64, the Missouri definition may well place viability later in pregnancy than the point of viability as defined in *Roe.* Thus, dismissal of this appeal or summary affirmance of the lower court's order would effectively bind the lower federal courts to a stricter definition than *Roe* required, *see Hicks v. Miranda,* 422 U. S. 332, 345 (1975), and would lead to the invalidation of the statutes of a number of States which after *Roe* defined viability by following this Court's language almost exactly.[1]

II.

Question III of Dr. Floyd's motion raises questions which cannot be answered upon this record.

As has already been noted (J. S. at 15, n. 7), the record in this case was developed as directed by the district judge only on the question of prosecutorial bad faith, an inquiry which does not turn on the sufficiency of the evidence at the state level. *Cameron v. Johnson,* 390 U. S. 611, 621 (1968). Nevertheless, Dr. Floyd asserts that some of the facts in this less-than-complete record support a conclusion that the fetus was pre-viable as a matter of law. However, even without full development of the record on the question of the viability of this fetus, considerable dispute is reflected therein concerning the facts upon which Dr. Floyd relies. In addition to the conflicting expert opinions as to the interpretation of birth weights, already discussed (J. S. at 7-8), the record contains a number of indications that the size and stage of development of this fetus were neither as

[1] See, e.g., Pennsylvania Abortion Control Act of 1974, § 2; Kentucky Revised Statutes, § 311.720.

unknown or as unknowable as Dr. Floyd has suggested. For instance, although Dr. Floyd states that he "openly and reasonably thought [this] to be a lawful pre-viable 24-week therapeutic abortion" (Motion at 13), he apparently was careful to leave nothing in writing at the hospital which would reflect this "open, reasonable and lawful" opinion. Louise's hospital record sheets, which in the usual case would contain the patient's history and physical condition and tell why she was admitted, are a series of blank pages save only Louise's name, address and next of kin.[2] As to the "unknowability" of the fetus's state of development, Dr. Floyd quotes the testimony of two witnesses to the effect that the more reliable ultrasound method of determining viability was unavailable at the time in Richland Memorial Hospital and in Columbia. However, Dr. Dennis, quoted by Dr. Floyd, also testified that ultrasound equipment was probably available at another hospital in the city (Dennis Dep. at pp. 17-18); the testimony of two other physicians was to the same effect and therefore equally contrary to Dr. Floyd's assertion. (Kanitkar Dep. at p. 18; Wyman Dep. at p. 32).

In summary, this case possesses neither a complete record nor the conclusions of a factfinder resolving the factual questions which even the incomplete record raises, and consideration of the issues raised by Question III of the Motion should thus be deferred.

[2] Riddle Dep., Ex. 1.

III.

The timing of the grand jury's vote is reflected in the record in a deposition taken by Dr. Floyd.

Dr. Floyd asserts that "Anders cannot elevate an unpublished grand jury vote to an 'ongoing state proceeding.' The vote was secret. No one knows the numbers in favor or even the time of the day of the vote." (Motion at 8). This statement is as disingenuous as it is misleading. The deposition of the grand jury foreman was taken not by Anders but by Dr. Floyd, who apparently was quite willing to inquire into the timing of the grand jury's vote until he found that the vote took place a number of hours before the federal hearing.[3] This very limited intrusion by Dr. Floyd into the grand jury's processes was sanctioned by the district judge shortly before the deposition began. *See* Taylor Dep. at 2. Moreover, this contention by Dr. Floyd does not address the issue of the prosecution having commenced with the presentment of the case to the grand jury, regardless of the timing of the vote.

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[3] While Dr. Floyd maintains that the time of day of the vote was unknown, the record plainly refutes this statement:

> Q. Mr. Taylor [grand jury foreman], what time of day did the Grand Jury vote to return a true bill?
>
> A. We voted immediately after Mr. Cook left.
>
> Taylor Dep. at 5.

The record elsewhere establishes that Mr. Cook, the investigator who presented the case to the grand jury, appeared before the grand jury on the morning of August 28, 1975. Taylor Dep. at 4, 6; Cook Dep. at 47. The federal hearing took place in the afternoon of that day.

CONCLUSION

For the reasons set forth above and in the jurisdictional statement, it is submitted that the Court should note probable jurisdiction and set the case for plenary review.

Respectfully submitted,

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